Anderson v. Creighton and Qualified Immunity

I. INTRODUCTION

Anderson v. Creighton[1] is the latest in a line of United States Supreme Court cases that has developed the doctrine of qualified immunity as a defense available to government officials in actions based on constitutional torts.[2] State officials most often raise the defense when sued under 42 U.S.C. § 1983;[3] federal officials assert qualified immunity when plaintiffs sue for deprivation of constitutional rights based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[4]

The Supreme Court first recognized a qualified immunity defense in 1967, in *Pierson v. Ray*,[5] when it held that a common law defense of good faith and probable cause could be asserted in a section 1983 suit.[6] The Court elaborated on the requirements for qualified immunity in 1974 when it decided *Scheuer v. Rhodes*:[7] the official's immunity is based on reasonable grounds for a belief in the legality of his or her actions and that belief must be in good faith.[8] Thus, the qualified immunity consisted of an objective and a subjective prong. The current test for qualified immunity was laid down in 1982 in *Harlow v. Fitzgerald*:[9] government officials performing a discretionary function are immune from liability for civil damages unless their conduct violates "clearly established statutory or constitutional rights of

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1. 107 S. Ct. 3034 (1987).

2. In this Comment, the term "constitutional tort" refers to a cause of action in tort in which the plaintiff seeks damages alleging deprivation of one or more rights protected by the United States Constitution. *See infra* notes 3 and 4.

3. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1982).

Section 1983 is not the only statutory basis of a cause of action for deprivations of federal constitutional rights. Others (which will not be discussed in this Comment) are listed in Gildin, *The Standard of Culpability in Section 1983 and* Bivens *Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 557 n.1 (1983). Of all the civil rights statutes involving federal rights violations, "42 U.S.C.A. § 1983 has been the main source of litigation." W. PROSSER & P. KEETON, HANDBOOK OF THE LAW OF TORTS 1061 n.48 (5th ed. 1984).

4. 403 U.S. 388 (1971). The Supreme Court held that the plaintiffs in *Bivens* had stated a private federal cause of action under the fourth amendment. *Id.* at 397. Further, the Court held that damages were available to successful plaintiffs for injuries resulting from violation of the fourth amendment. *Id.* at 395. The cause of action created in *Bivens* has since been extended to violations of other constitutional rights. *See, e.g.*, Gardels v. Murphy, 377 F. Supp. 1389 (N.D. Ill. 1974) (first amendment); Beard v. Mitchell, 604 F.2d 485 (7th Cir. 1979) (fifth amendment due process); Wounded Knee Legal Defense/Offense Comm. v. Federal Bureau of Investigation, 507 F.2d 1281 (8th Cir. 1974) (sixth amendment); Carlson v. Green, 446 U.S. 14 (1980) (eighth amendment).

Bivens created a cause of action against those acting under color of federal law that is the counterpart of the § 1983 cause of action against those acting under color of state law. However, whereas § 1983 actions were created by Congress and are thus based on a statute, *Bivens* actions were recognized by the Supreme Court as based directly on the United States Constitution.

5. 386 U.S. 547 (1967).

6. *Id.* at 557.

7. 416 U.S. 232 (1974).

8. *Id.* at 247–48.

9. 457 U.S. 800 (1982).

which a reasonable person should have known."[10] Because qualified immunity is an immunity from suit,[11] the court must decide whether the defendant is entitled to qualified immunity before the case goes to the fact finder. If the defendant is found to be immune, the case cannot proceed to trial.[12]

The defense of qualified immunity is the Supreme Court's response to the difficulties created for officials by a proliferation of *Bivens* and section 1983 actions once the damage remedy for constitutional torts became available. On one hand, the Court wanted to preserve the cause of action against government officials who abused citizens' rights.[13] On the other hand, officials must be free to take bold action when necessary.[14] Moreover, they must be given time to do their work, rather than be forced to spend their days huddled with their lawyers, preparing for and then participating in endless litigation. The Court feared that talented persons would avoid or leave government service if faced with such a prospect.[15] The Court's task, then, was to elucidate a qualified immunity test that would allow only worthwhile suits to go to trial but not permit constitutional violations to go unchecked.

Resolution of the question of qualified immunity is of vital importance in *Bivens* and section 1983 suits.[16] The Supreme Court intended that the issue be settled early in the litigation.[17] As the Court developed the test for application of qualified immunity, it required that the issue be settled no later than the summary judgment stage. The Court reasoned that if a defendant who raises the qualified immunity defense must submit to trial to be found entitled to the immunity, the purpose of the immunity—not to be forced to submit to trial—would be defeated.[18] In a line of cases stretching from *Scheuer v. Rhodes*[19] to *Anderson v. Creighton*,[20] the Court has approached the issue of whether qualified immunity applies in a particular case by asking whether the right allegedly violated is clearly established. That approach has

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10. *Id.* at 818.

11. "*Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in original).

12. *Harlow*, 457 U.S. at 818.

13. *See, e.g., Scheuer*, 416 U.S. at 247–48.

14. *Id.* at 241–42.

15. *Harlow*, 457 U.S. at 814. For a historical analysis of the grounds of official immunity—unfairness, deterrence, and distraction—see Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526, 528–30 (1977).

16. For purposes of qualified immunity analysis, the Supreme Court treats *Bivens* and § 1983 suits the same:

> [W]ithout congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution. . . . That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.

Butz v. Economou, 438 U.S. 478, 504 (1978).

17. *See Harlow*, 457 U.S. at 818.

18. Mitchell v. Forsyth, 472 U.S. 511, 525–26 (1985).

19. 416 U.S. 232 (1974).

20. 107 S. Ct. 3034 (1987).

proved problematic for the lower courts: just how clearly established does a constitutional right have to be to overcome an assertion of qualified immunity?

Anderson v. Creighton expanded the qualified immunity inquiry beyond the issue of whether the right allegedly violated was clearly established. Justice Scalia's majority opinion focused on the other part of the *Harlow* formulation of the test, which asks a second question. Even if the constitutional right allegedly violated was clearly established before the incident in question occurred, would a reasonable official in the defendant's position have known that his or her conduct violated the right? "The contours of the right must be sufficiently clear that *a reasonable official would understand* that what he is doing violates that right."[21] The *Anderson* decision, in effect, creates a two-pronged test for qualified immunity, separating the issue of whether the right is clearly established from a new question, whether the defendant-official should have known his or her conduct violated that clearly established right. The second issue requires an inquiry that Justice Scalia described as "fact-specific."[22] Courts ruling on summary judgment motions based on qualified immunity must "examin[e] the information possessed by the . . . officials."[23] In establishing that the qualified immunity test has two prongs, the Supreme Court has provoked new questions about the second prong, especially concerning the place of facts in the reasonableness inquiry and the availability of pretrial discovery in uncovering those facts.

This Comment will first trace the Court's development of the defense of immunity generally, and the development of the qualified immunity in particular, in *Bivens* and section 1983 actions.[24] Next, this Comment will explore how *Anderson v. Creighton* defines and applies the second prong of qualified immunity analysis—the reasonableness under the circumstances of the defendant's belief that his or her conduct did not violate a constitutional right.[25] The Comment will conclude with a proposal that resolves the inconsistency legislatively. Congress and state legislatures should allow executive officials who are found not to be immune and who must pay damages to be indemnified by their agency or department if the defendants can prove that their ignorance of a clearly established right is the fault of their superiors.[26]

II. Establishing the Terms of Qualified Immunity

Neither 42 U.S.C. § 1983 nor the *Bivens* opinion mentions any immunity from suit in cases dealing with constitutional torts.[27] The United States Supreme Court has incorporated common law official immunities to formulate immunity doctrine in constitutional torts.[28] In suits for damages, judges, prosecutors, and legislators

21. *Id.* at 3039 (emphasis added).

22. *Id.* at 3040.

23. *Id.*

24. *See infra* notes 27–84 and accompanying text.

25. *See infra* notes 85–116 and accompanying text.

26. *See infra* notes 117–43 and accompanying text.

27. *See supra* note 3 and Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

28. For information on immunities and the common law, see Balcerzak, *Qualified Immunity for Government*

performing in their official capacity enjoy absolute immunity, in line with their absolute immunity at common law,[29] as do executive officials acting in a legislative or judicial capacity.[30] In contrast, in the executive branch, only the President of the United States has absolute immunity from civil suit.[31] In *Scheuer v. Rhodes*, the Court examined the legislative history of 42 U.S.C. § 1983, concluding that although Congress did not intend to abolish all common law immunities in creating this cause of action, Congress did intend to exempt legislators from suit under the statute.[32] Likewise for the judiciary, the Court concluded that if in enacting 42 U.S.C. § 1983 Congress had intended to abolish absolute common law immunity for judges, "it would have done so specifically."[33] However, as the Court formulated the rule in *Harlow*, "For executive officials in general, . . . our cases make plain that qualified immunity represents the norm."[34] As it worked out the details of the qualified immunity defense to constitutional torts, the Court was guided by two principles: first, because qualified executive immunity is an immunity from suit, the question must be decided early in the litigation; second, the number of actions for damages should be limited by the use of immunity analysis to terminate these suits early, but qualified immunity should not be used to terminate worthwhile suits.

A. *The Pre-*Harlow *Development of Qualified Immunity*

As originally formulated, the doctrine of qualified immunity consisted of two components, objective reasonableness and subjective good faith. In *Pierson v. Ray*, the United States Supreme Court held that police officers sued under section 1983 could assert a defense of good faith and probable cause.[35] The Court explained the general application of this defense as a qualified immunity available to members of the executive branch in *Scheuer v. Rhodes*, a section 1983 suit brought against Ohio's governor and others by relatives of students shot by National Guardsmen at Kent State University.[36] The Court rejected Governor Rhodes's assertion of absolute immunity, holding that executive officers of a state government were entitled only to

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Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation, 95 YALE L.J. 126, 129 n.12 (1985); Scheuer v. Rhodes, 416 U.S. 232, 240–48 (1974).

29. *See* Stump v. Sparkman, 435 U.S. 349 (1978) (judges absolutely immune for judicial acts); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors absolutely immune for prosecutorial conduct); Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators absolutely immune for legislative acts). Members of Congress derive their absolute immunity from the Speech and Debate Clause. U.S. CONST. art. I, § 6, cl. 1.

30. *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978) (Secretary of Agriculture performing functions of prosecutor at agency hearing entitled to absolute immunity with respect to conduct in that capacity).

31. Nixon v. Fitzgerald, 457 U.S. 731 (1982). *Cf.* United States v. Nixon, 418 U.S. 683 (1974) (President not immune from criminal prosecution).

32. *Scheuer*, 416 U.S. at 244.

33. *Id.* (summarizing Pierson v. Ray, 386 U.S. 547, 554 (1967)). The Court could have interpreted Congress's silence on immunities to mean that Congress meant no immunities to apply to § 1983 suits. However, "where an immunity was established at common law, and the policies underlying that immunity are compatible with the purposes of section 1983, Congress is presumed [by the Supreme Court] to have *sub silentio* incorporated the immunity as a defense to suits under section 1983." Gildin, *supra* note 3, at 580.

34. *Harlow*, 457 U.S. at 807.

35. 386 U.S. 547, 556 (1967). It is not clear what the Court meant by "probable cause" in this context.

36. 416 U.S. 232 (1974).

a qualified immunity.[37] The Court reiterated the two parts of the qualified immunity defense established in *Pierson v. Ray*: qualified immunity required both objective probable cause and subjective good faith.[38] The scope of the immunity varied with "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."[39] Qualified immunity was also dependent on the existence of good faith on the part of the defendant official.[40]

A year later, the Court provided a more concrete definition of the objective and subjective parts of the qualified immunity test when it decided *Wood v. Strickland*.[41] The Court held that an official would not be protected by qualified immunity if he "knew or reasonably should have known that the action [he] took within [his] sphere of official responsibility would violate the constitutional [right] of the [plaintiff]" or the action was taken "with the malicious intention to cause a deprivation of [constitutional rights]."[42] Thus, the defendant school administrators' conduct was subjected to the standard of "knowledge of the basic, unquestioned constitutional rights" of their students and the "permissible intentions" of the administrators.[43] Defendants could lose their immunity by failing either part of this test: "disregard of the [plaintiff's] clearly established constitutional rights" or subjective malice[44] could overcome a defense of qualified immunity.

One other pre-*Harlow* case established three important guidelines followed in subsequent decisions. In *Butz v. Economou*,[45] the Court made it clear that for purposes of qualified immunity analysis, a section 1983 suit and a *Bivens* suit are to be treated the same.[46] Second, the Court used the occasion of the *Butz* decision to remind the lower courts that when properly applied, qualified immunity serves to terminate insubstantial suits *before* they proceed to trial: "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits."[47] Finally, *Butz* made it clear that executive immunity from civil suit is not merely a function of the name of the branch of government to which the defendant belongs. Whether one is entitled to absolute or to qualified immunity turns on one's function: because Butz was acting in a prosecutorial capacity when the conduct in question took place, he was entitled to claim the same absolute immunity as a prosecutor.[48]

As the Court filled in the details of the qualified immunity defense with these decisions, it became clear that the Court meant to use qualified executive immunity

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37. *Id.* at 247–48.
38. *Id.* at 244–45.
39. *Id.* at 247.
40. *Id.* at 249–50.
41. 420 U.S. 308 (1975).
42. *Id.* at 308.
43. *Id.* at 322.
44. *Id.*
45. 438 U.S. 478 (1978).
46. *Id.* at 500–01.
47. *Id.* at 508.
48. *Id.* at 511–12. *See supra* note 30.

as a gatekeeper to control the number of constitutional tort actions going to trial. Qualified (and where appropriate, absolute) executive immunity analysis was used to eliminate insubstantial suits as quickly as possible.[49] However, as the Court recognized in *Harlow*, the subjective prong of the test undermined the efficiency of executive immunity as a gatekeeper.

B. Harlow v. Fitzgerald

In 1982, the United States Supreme Court dramatically changed the test of qualified executive immunity in *Harlow v. Fitzgerald*[50] by abandoning the subjective prong of the test. In this case, an employee of the Financial Management Office of the Air Force sought civil damages based on an alleged conspiracy by Nixon Administration White House aides to have the employee fired.[51] The first part of the Court's opinion rejected the defendant aides' claim that they were entitled to absolute immunity.[52] The remainder of the majority opinion explored the scope of the qualified immunity to which the defendants were entitled.[53] The Court abandoned the subjective element of the test elucidated in *Wood v. Strickland*[54] and explained how courts were to deal with the remaining objective prong of the test, especially as it involves the use of discovery.

The primary reason the Court abandoned the subjective prong was that it was a hole in the gate which allowed potentially frivolous suits to survive summary judgment: "The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial."[55] The lower courts had treated "bare allegations of malice"[56] as raising disputed questions of fact that precluded termination of the case on the defendant's motion for summary judgment and forced the officials to proceed with the lawsuit.[57] Because "the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions,"[58] judges had been reluctant to decide this subjective question by summary judgment. The balance the Court had attempted to strike between the availability of a remedy for violations of rights by executive officials and the need to protect those officials from frivolous

49. In fact, as more than one commentator has observed, because courts can decide at the outset that a right is not yet clearly established, it has become difficult to use constitutional tort cases to *establish* a new actionable constitutional right on which to base subsequent *Bivens* or § 1983 actions. *See* Balcerzak, *supra* note 28; Freed, *supra* note 15; McCann, *The Interrelationship of Immunity and the* Prima Facie *Case in Section 1983 and* Bivens *Actions*, 21 GONZ. L. REV. 117 (1985); Sowle, *Qualified Immunity in Section 1983 Cases: The Unresolved Issues of the Conditions for Its Use and the Burden of Persuasion*, 55 TUL. L. REV. 326 (1981).

50. 457 U.S. 800 (1982).

51. *Id.* at 804.

52. *Id.* at 802–13.

53. *Id.* at 813–20.

54. 420 U.S. 308 (1975); *see supra* notes 41–44 and accompanying text.

55. *Harlow*, 457 U.S. at 815–16.

56. *Id.* at 817.

57. Federal Rule of Civil Procedure 56(c) sets forth the primary test for granting summary judgment. It provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

58. *Harlow*, 457 U.S. at 816.

suits was upset by this use of the subjective prong of the qualified immunity test. Thus, the Court reversed itself, holding that the test for qualified executive immunity was now entirely objective: "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established . . . rights of which a reasonable person would have known."[59]

The Court had been disturbed not only by the prospect of baseless suits surviving the summary judgment stage but by the amount of discovery the subjective part of the test had allowed: "Judicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government."[60] To remedy that problem, the Court made it clear that the judge should rule on defendants' qualified-immunity based summary judgment motions *without allowing discovery* on the issue.[61]

This holding requires the lower courts to base their qualified immunity rulings on the parties' pleadings, and even more narrowly on the plaintiff's version of the facts.[62] The Court left unanswered the questions of how a judge was to determine what a reasonable person in the defendant's position should be expected to know concerning what rights are clearly established, and how clearly established a right must be for a judge to hold a defendant responsible for knowing about it. Justice Brennan's concurrence revealed that he was aware of the difficulty: "[I]t seems inescapable to me that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did 'know' at the time of his actions."[63] There are two difficulties with Justice Brennan's phrasing. First, determining what a *particular* defendant knew is not the purpose of *Harlow*'s objective test. Second, the test does not require an inquiry into what the defendant actually did know, but what he or she *should* have known. Even so, Justice Brennan identifies a problem with the majority's prohibition of discovery. The majority does not allow the plaintiff and defendant to try to establish through discovery what a reasonable official in the defendant's position should know.

III. AMBIGUITIES ARISING FROM THE *HARLOW* QUALIFIED IMMUNITY TEST

The problems raised by *Harlow*'s prohibition of discovery prior to a summary judgment ruling on qualified immunity do not arise under the first part of the purely objective *Harlow* test. A court can decide whether the right allegedly violated has been held to give rise to a constitutional tort and thus a cause of action under *Bivens* or a statute like section 1983,[64] without recourse to discovery concerning the state of

59. *Id.* at 818.

60. *Id.* at 817 (footnotes omitted).

61. "Until this threshold immunity question is resolved, discovery should not be allowed." *Harlow*, 457 U.S. at 818.

62. *Id.* at 816 n.26.

63. *Id.* at 821 (Brennan, J., concurring).

64. *See supra* note 3 for a discussion of other civil rights statutes.

knowledge of constitutional rights among public officials. Subsequent to *Harlow* and prior to *Anderson*, the Court concentrated on this "established right" analysis. The issue of whether a right was established with sufficient clarity was approached in terms of decisional law, not analysis of the state of knowledge of public officials. Judges are capable of deciding whether a plaintiff is asserting a constitutional tort cause of action without recourse to information gathered by the parties in the course of discovery. The problem, alluded to but not solved in *Anderson*, is how strict the standard should be for deciding that a rule is *clearly* established under existing case law.

The United States Supreme Court's decision in *Mitchell v. Forsyth*[65] exemplifies decisions that turned on the question of whether the plaintiff could even state a cause of action based on the deprivation of a constitutional right. Attorney General John Mitchell authorized an FBI wiretap of an antiwar group in 1970.[66] Two years later, in 1972, the Supreme Court held in *United States v. United States District Court (Keith)* that warrantless wiretaps are prohibited by the fourth amendment.[67] In *Mitchell*, the Court held that if the Attorney General had authorized such a wiretap after the *Keith* decision, he would not have been entitled to qualified executive immunity, because *Keith* clearly established that a wiretap of that sort was a fourth amendment violation.[68] In other words, in 1970 there was no basis for a constitutional tort because case law had not yet established the right on which the Attorney General was sued.

Another qualified immunity decision that turned on the timing of the conduct in question was *Davis v. Scherer*.[69] In that case, the defendant was entitled to qualified immunity because the right of a state employee to a termination hearing was not clearly established in the Fifth Circuit at the time the suit was brought.[70] Again, as in *Mitchell*, the decision turned on the state of the applicable case law at the time of the alleged constitutional violation. According to the Court, an executive official should not be held responsible for predicting the course of constitutional adjudication.[71] *Mitchell* and *Davis* provided the Court no opportunity to address the second prong of the immunity analysis, *i.e.*, whether the reasonable defendant should have been aware of a clearly established right.

When the question whether a right has been clearly established for immunity purposes is not one of timing but of how precisely the right must have been established, a court must take into account the similarity of the case at bar to previously decided cases. Two cases decided in the federal appeals courts in 1987 (but prior to *Anderson*) illustrate two different approaches the courts have taken. In

65. 472 U.S. 511 (1985).
66. *Id.* at 513.
67. 407 U.S. 297 (1972).
68. *Mitchell*, 472 U.S. at 530.
69. 468 U.S. 183, *reh'g denied*, 468 U.S. 1226 (1984).
70. *Id.* at 192.
71. One commentator refers to liability for a constitutional tort before it is clearly established as "surprise liability." Freed, *supra* note 15, at 558.

Jefferson v. Ysleta Independent School District,[72] the Fifth Circuit did not point to a specific holding in a case with similar facts, but stated the basis of the constitutional cause of action in fairly general terms. In contrast, the Seventh Circuit insisted in *Danenberger v. Johnson*[73] that for a right to be clearly established, the facts of the case law claimed to establish the right and the facts of the case at bar must "closely correspond."[74]

In *Jefferson*, the parents of a second grade student sued their daughter's teacher and principal under section 1983, claiming that tying the child to a chair for the better part of two days constituted a violation of her rights under the fourth, fifth, eighth, and fourteenth amendments.[75] The defendants asserted a defense of qualified immunity.[76] The district court denied a motion to dismiss on the basis of qualified immunity, and the defendants appealed.[77] The Fifth Circuit upheld the district court, stating that "[i]n determining what a reasonable teacher should know in this instance, it is not necessary to point to a precedent which is factually on all-fours with the case at bar." Rather, "[i]t suffices that the teacher be aware of general, well-developed legal principles."[78] The general principle in *Jefferson* was the due process right to be free of state-inflicted damage to one's bodily integrity.[79] The Fifth Circuit reviewed and rejected cases offered by the defendants as establishing that the child did not have the right to be free from the kind of treatment to which the school officials subjected her.[80] Significantly, however, the court did not require the plaintiffs to produce case law with similar facts. The general constitutional principle sufficed to establish clearly the teacher's actions as a violation of the child's due process rights.

In contrast, the Seventh Circuit employed a much stricter approach in *Danenberger v. Johnson*,[81] an appeal from the district court's dismissal of the plaintiff's section 1983 claim occasioned by her failure to be promoted in her state job.[82] The defendants acknowledged that the employee's promotion was withdrawn because she did not support Republican Party activities, but they claimed qualified immunity as the basis for their motion to dismiss.[83] In upholding the defendants' entitlement to qualified immunity, the Seventh Circuit examined the cases upon which the plaintiff relied to establish clearly the right upon which she brought her suit. Because both

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72. 817 F.2d 303 (5th Cir. 1987).

73. 821 F.2d 361 (7th Cir. 1987).

74. *Id.* at 363 (quoting Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986)).

75. According to the Fifth Circuit, if the plaintiff's allegations were proven, the defendants violated the child's fifth and fourteenth amendment rights to substantive due process by interfering with her right to be free from bodily restraint. *Jefferson*, 817 F.2d at 305. The court did not explain the application of the fourth and eighth amendments to the facts of the case.

76. *Id.* at 305.

77. *Id.*

78. *Id.*

79. *Id.* (citing Schillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981) (in turn citing Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980))).

80. *Jefferson*, 817 F.2d at 305–06.

81. 821 F.2d 361 (7th Cir. 1987).

82. *Id.* at 361.

83. *Id.* at 362.

cases dealt only with discharges for failure to support a political party, not withdrawn promotions, the defendants' qualified immunity defense prevailed.[84]

The "clearly established" inquiry is only half of the test for qualified immunity. The contrast between *Jefferson* and *Danenberger* reveals the difficulties of that initial determination and the spectrum of possible interpretations to which the term "clearly established" is subject. This is one of the problems with the test for qualified executive immunity on which the Supreme Court attempted to provide guidance when it decided *Anderson v. Creighton.*

IV. *ANDERSON V. CREIGHTON*

Anderson v. Creighton[85] was an appeal from a 1985 Eighth Circuit case, *Creighton v. City of St. Paul.*[86] In *Anderson,* the United States Supreme Court hoped to clarify its earlier decisions and provide guidance for the circuit courts in their analysis of the qualified immunity defense. In *Anderson,* the Court made it clear that a defendant in a constitutional tort suit could be entitled to immunity on either of two grounds. First, if a court finds that the defendant's alleged conduct violated no clearly established constitutional right, the defendant official is entitled to qualified immunity.[87] Second, even if the defendant official's alleged conduct violated a clearly established rule, the official is still entitled to immunity if he or she can show, in support of a pretrial motion to terminate the litigation, that a reasonable official could still have believed the conduct in question to have been lawful, even though that belief was mistaken.[88] Thus, the Court in *Anderson* treated the qualified immunity test as having two distinct parts.

The Eighth Circuit in *Creighton v. City of St. Paul* held that an FBI agent who conducted a warrantless search of the plaintiffs' home in the middle of the night[89] was not entitled to qualified immunity in the Creightons' *Bivens* action.[90] Defendant Anderson asserted qualified immunity on the grounds "that 'exigent circumstances' justified his failure to obtain a warrant,"[91] and that "the meaning of 'exigent circumstances' was not clearly established" at the time of the alleged violation.[92] Writing for the Eighth Circuit, Judge Heaney disagreed. Because the plaintiffs' fourth amendment rights were clearly established, and because the doctrine of exigent circumstances was clearly established by case law before the search took place, the court concluded that Anderson should have known his alleged conduct violated those

84. *Id.* at 363–64.
85. 107 S. Ct. 3034 (1987).
86. 766 F.2d 1269 (8th Cir. 1985), *vacated and remanded sub nom.* Anderson v. Creighton, 107 S. Ct. 3034 (1987).
87. *Anderson,* 107 S. Ct. at 3039.
88. *Id.* at 3040.
89. Creighton v. City of St. Paul, 766 F.2d 1269, 1270 (1985).
90. *Id.* at 1277.
91. *Id.*
92. *Id.*

rights.[93] Holding that the Eighth Circuit misapplied the qualified immunity test,[94] the Supreme Court explained the correct test and vacated and remanded the case.[95]

A. *The First Prong: Is the Rule Clearly Established in the Case Law?*

The United States Supreme Court opinion in *Anderson* began with an attempt to clarify for the lower courts the definition of the "clearly established" criterion of the qualified executive immunity test.[96] Writing for the majority, Justice Scalia reiterated the basics of the qualified immunity test, derived from *Harlow*: "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken."[97] Justice Scalia then considered the level of generality necessary to meet the definition of "clearly established," concluding that neither merely citing the existence of a constitutional right like due process nor, at the other extreme, pleading the identical facts on which a previous defendant was held to have been liable for a deprivation of an established right, was an appropriate standard by which to decide that the defendant official should not be entitled to the protection of the qualified immunity defense.[98]

The *Anderson* standard, that "in the light of preexisting law the unlawfulness must be apparent,"[99] seems to come down somewhere between the very strict standard of *Danenberger* and the broader interpretation of "clearly established" employed in *Jefferson*. The Supreme Court did not offer the specific guidelines the circuit courts need. At any rate, the Court's vague standard allows the lower courts to continue to interpret previous case law in light of new litigation on a case-by-case basis.

The Court has chosen what is probably the best approach under the circumstances, although it is rather misleading to claim that *Anderson* will clarify the question of what constitutes clearly established rights and then offer only the vague standard that "the unlawfulness must be apparent." But because the Bill of Rights is written in necessarily general language, and because the application of a particular right to a particular situation depends so much on analysis of the facts of that situation, it is difficult, and likely impossible, to formulate a guideline more specific than "Use previous case law," as the Court did in *Anderson*,[100] and "Don't go to

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93. *Id.*

94. *Anderson*, 107 S. Ct. at 3039.

95. *Id.* at 3042.

96. *Id.* at 3039. For a discussion of the disagreement among the circuits, see *supra* notes 72–84 and accompanying text.

97. *Id.* at 3038 (citations omitted).

98. *Id.* at 3038–39.

99. *Id.* at 3039 (citations omitted).

100. The Court relied especially on Malley v. Briggs, 475 U.S. 335 (1986) (police officers who apply for warrants have qualified immunity if a reasonable officer could have believed the application to be supported by probable cause); Mitchell v. Forsyth, 472 U.S. 511 (1985) (official who conducted warrantless wiretap entitled to qualified immunity); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (reasonableness of official's belief in the constitutionality of his conduct is part of the qualified immunity inquiry).

extremes." It is possible that the necessary vagueness of the "clearly established" prong prompted the Court to attempt to define the second prong in order to give the circuits a useful second inquiry to help them apply qualified immunity appropriately.

B. *The Second Prong: Is the Official's Belief in the Constitutionality of His or Her Actions Reasonable?*

The *Anderson* opinion is the Court's first significant attempt to focus on the second portion of the qualified immunity inquiry.[101] *Anderson* stands for the principle that unless the "contours of the right"[102] are apparent *to a reasonable official*, it does not matter that the right may be clearly established in the case law. In other words, this decision focuses on what is apparent to a public official defendant, not to judges or even to plaintiffs' attorneys.

In his Supreme Court brief, Anderson stated the "Question Presented" this way:

> Whether a law enforcement officer's immunity from monetary liability under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), may be defeated by a showing that the general legal standard governing the officer's conduct was clearly established at the time of the relevant events, or whether the officer's immunity may only be overcome *if he reasonably should have known that his particular conduct violated the applicable constitutional standards.*[103]

The Court agreed that the second test of immunity was the proper standard. In Justice Scalia's words, "[i]t simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable."[104]

The Court treated the two inquiries—clearly established law and reasonable belief in the legality of one's conduct—separately. When the qualified immunity defense is raised, a court must first decide whether the plaintiff alleges violation of a clearly established constitutional right. This is a matter of interpretation of case law, involving considerations of timing and the necessary degree of similarity between the facts involved in previously settled case law and the facts of the case at bar.[105] If the rule is not clearly established, the defendant is entitled to immunity. If the rule is clearly established, however, the court cannot stop there, deny the official qualified immunity, and let the case proceed to trial. Before qualified immunity can be denied, the second inquiry must also be answered in the affirmative: in spite of the fact that the rule was clearly established, should an official in the defendant's position have known that his conduct violated the plaintiff's rights? If the answer is "no," the defendant is still entitled to immunity, even though his alleged conduct violated a

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101. The Court did not treat the two-pronged test of *Anderson* as a departure from its earlier decisions. Instead, Justice Scalia asserted that *Anderson* represented clarification of the objective test announced in *Harlow*: "[O]ur holding today does not extend official qualified immunity beyond the bounds articulated in *Harlow* and our subsequent cases . . . ." *Anderson*, 107 S. Ct. at 3040 n.3.

102. *Id.* at 3039.

103. Brief for Petitioner at 1, Anderson v. Creighton, 107 S. Ct. 3034 (1987) (emphasis added).

104. Anderson, 107 S. Ct. at 3039.

105. *See supra* notes 64–84 and accompanying text.

clearly established constitutional proscription. The plaintiff gets no chance to prove to a fact-finder that the alleged conduct occurred as he or she said it did because the suit terminates before trial.

The Eighth Circuit Court of Appeals mistakenly collapsed the two inquiries into one when it decided *Creighton v. City of St. Paul*,[106] the decision from which Anderson appealed. That court cited *Harlow*'s test: "'[I]f the law was clearly established, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct.' [*Harlow v. Fitzgerald*] at 818-19, 102 S.Ct. at 2738-39."[107] This passage from *Harlow* seems to have encouraged the *Creighton* court to eliminate the second prong as a separate inquiry.

Justice Stevens's dissent in *Anderson v. Creighton* begins by accusing the majority of "announc[ing] a new rule of law."[108] However, even though the *Harlow* description of the qualified immunity analysis assumed that if the right were clearly established the defendant could be expected to know whether his or her conduct violated it, its one-sentence formulation does not preclude the *Anderson* majority's separation of objectively reasonable belief from clear establishment of a right. The *Harlow* statement of the test was as follows: "We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights *of which a reasonable person would have known.*"[109]

One way of making the distinction between the first issue, whether the right is an established basis for actions in constitutional tort, and the second issue, whether officials in the defendant's shoes must be held responsible for understanding the connection between their conduct and the right, is to focus on the word "clearly." To whom must the right be clear? *Anderson* deals with the possibility that a right may be clearly established in legal circles yet still not be clear enough that a public official who must make difficult and swift decisions would reasonably be on notice of the contours of the right. As the Fourth Circuit Court of Appeals put it, "[c]ertainly we cannot expect police officers to carry . . . a Decennial Digest on patrol; they cannot be held to . . . a legal scholar's expertise in constitutional law."[110]

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106. 766 F.2d 1269 (1985), *vacated and remanded sub nom.* Anderson v. Creighton, 107 S. Ct. 3034 (1987).

107. *Id.* at 1277.

108. *Anderson*, 107 S. Ct. at 3043 (Stevens, J., dissenting). The dissent focuses on the established bases for reasonable searches; clearly the dissent and the majority are dealing with two different parts of the qualified immunity inquiry. Justice Stevens insists that fourth amendment principles are settled enough to be clearly established. *Id.* at 3048. The majority states instead that a public official may still reasonably believe his or her conduct to be constitutional even if the dissent is correct, that is, even if fourth amendment principles applicable in this case are clearly established. *Id.* at 3039.

109. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citations omitted) (emphasis added).

110. Tarantino v. Baker, 825 F.2d 772, 775 (4th Cir. 1987) (quoting Saldana v. Garza, 684 F.2d 1159, 1165 (5th Cir. 1982)).

C. *Reasonableness as a "Fact-Specific" Inquiry and the Continued Prohibition of Discovery*

Because an official may reasonably believe that his or her conduct was constitutional and thus be entitled to qualified immunity even if that belief was mistaken, the Court stated that deciding the reasonableness issue "will often require examination of the information possessed by the searching officials."[111] The Court insisted that this inquiry is still an "objective (albeit *fact-specific*) question. . . ."[112] The *Anderson* opinion does not elaborate on how this inquiry is to proceed. In a footnote, Justice Scalia addressed the appropriateness of discovery on questions of qualified immunity.[113] Although *Harlow* prohibited discovery prior to a ruling on qualified immunity,[114] some federal courts persisted in allowing it when they deemed it appropriate.[115] If the objective reasonableness prong is a fact-specific inquiry, one might have expected the Court to alter its *Harlow* prohibition. Instead, the Court reiterated that one important policy behind qualified immunity is avoiding the disruption of government officials' performance of their jobs by subjecting them to extensive discovery.[116]

The problem that the Court has not confronted in *Anderson* is that a fact-specific inquiry to establish what a reasonable official could have believed concerning the constitutionality of his or her actions requires that courts have access to more facts than those asserted in the pleadings. Because the Court has explained that qualified immunity requires two steps in cases like *Anderson*, and that it is unjust to deny defendants like Anderson the second step, it is time to consider what kind of

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111. *Anderson*, 107 S. Ct. at 3040.

112. *Id.* (emphasis added).

113. Justice Scalia explained:

> Noting that no discovery has yet taken place, the Creightons renew their argument that, whatever the appropriate qualified-immunity standard, some discovery would be required before Anderson's summary judgment motion could be granted. We think the matter somewhat more complicated. One of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." 457 U.S. at 817, 102 S. Ct. at 2737–38 (footnote omitted). For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation. Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery. If they are not, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity.

Id. at 3042–43 n.6 (citations omitted). In other words, discovery prior to a determination of the defendant official's entitlement to qualified immunity will be disallowed if the plaintiff requests it merely to help establish what the defendant should have known. It is permitted only if the plaintiff's version of the facts would result in a determination that the defendant's belief in the constitutionality of his actions was unreasonable. In that event, if the defendant offers a different version of the facts, the judge must permit discovery, apparently in order to help his determination of which version of the facts to credit. This comes very close to trying the case, that is, engaging in fact-finding, at the summary judgment stage. Genuine disputes of material fact are supposed to be resolved at trial. *See* FED. R. CIV. P. 56(c), *supra* note 57.

114. *Harlow*, 457 U.S. at 818.

115. *See, e.g.*, Kompare v. Stein, 801 F.2d 883 (7th Cir. 1986); Brown v. District of Columbia, 638 F. Supp. 1479 (D.D.C. 1986); Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984).

116. *Anderson*, 107 S. Ct. at 3042–43 n.6. See *supra* note 113 for the full text of the footnote.

discovery the second step requires in order that the *Anderson* decision not lead to a new injustice.

V. The Discovery Dilemma

Justice Brennan's concurrence in *Harlow*[117] recognized the need for discovery in cases in which the judge must decide whether to grant immunity on the basis of what a reasonable defendant should be expected to know about the constitutional ramifications of a contemplated course of conduct. Since *Anderson v. Creighton* has made it clear that the reasonableness of the belief may by itself support a defense of qualified immunity, it is more important than ever that judges be able to decide that issue competently.

The desire of the Court in *Anderson* to continue to prohibit, or at the very least to limit severely, discovery on the qualified immunity issue stems from the nature of the immunity itself. If one justification for the existence of qualified immunity is that it protects government officials from the distractions of continual litigation, it follows that the earlier the immunity decision can be made, the better. Prolonged discovery can be as distracting and time-consuming to a public-official defendant as trial itself.[118]

The *Anderson* decision leaves the Supreme Court on the horns of a dilemma. In an effort not to allow qualified immunity to "be transformed . . . into a rule of pleading,"[119] the Court abandoned the subjective prong in *Harlow*, but in *Anderson* insisted that the inquiry be expanded beyond the threshold question of clearly established case law. Confining the determination of entitlement to qualified immunity to the pretrial stage of litigation ensures that plaintiffs with insubstantial claims waste as little of everybody's time as possible. But in its concern that the defendant's access to qualified immunity not be weakened, the Court in *Anderson* has *expanded* the necessary qualified immunity inquiry, whereas in *Harlow* the Court contracted the scope of the inquiry by giving the lower courts one less question to analyze. The contraction of the scope of discovery, perhaps even elimination of discovery altogether, was a logical corollary to the narrowing of the inquiry. This is not the case in *Anderson*.

Nowhere in *Anderson* does the Court guide the lower courts in deciding on the objective legal reasonableness of the defendant's belief that his or her actions did not violate the Constitution. It is difficult to conceive of how an effective determination of the second prong of the qualified immunity test can proceed without access to the circumstances in which the defendant decided on the course of conduct at issue. That factual inquiry is necessary because the Court acknowledges that "the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination

117. *See supra* note 63 and accompanying text.
118. *Harlow*, 457 U.S. at 817–18.
119. *Anderson*, 107 S. Ct. at 3039.

of the information possessed by the searching officials."[120] Further, the second prong is to be analyzed "in light of clearly established law *and the information the searching officers possessed.*"[121] However, the Court has prohibited discovery into just those facts upon which the second prong depends. What kind of information would a judge need to make a wise decision on this issue?

At a minimum, a judge needs the following information. First, the judge needs to know the circumstances in which the official decided to take the action in question. Second, the judge should know whether the official had to make the decision without time for adequate reflection. If the decision had to be made quickly, the defendant would have less opportunity to consult with anyone or to contemplate the legal implications of the action. A warrantless search of the sort undertaken in *Anderson*[122] may result from the fact that the defendant had no time to obtain a warrant, given the circumstances. Third, having investigated the circumstances in which our mythical objectively reasonable official would make the decision, the court will also need information concerning the sources of information available to officials in the defendant's position. For instance, in *Anderson*, what guidelines do the national and local offices of the FBI distribute to agents in the field concerning reasonable searches and seizures? Are FBI agents updated on new developments in fourth amendment law? Did this particular defendant follow the guidelines or updates? A fourth question to be answered by the use of discovery concerns the agents' training. What are they taught about constitutional law in general? What are they taught about the fourth amendment in particular? Does the Bureau require periodic in-service training to keep up with new developments in fourth amendment adjudication?

These questions do, indeed, require taking depositions and discovering documents. The Court in *Harlow* was concerned about the disruption caused by "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues."[123] One could argue that the sort of discovery outlined above is not broad-ranging in the way that discovery concerning a defendant's subjective state of mind would have to be.[124] If the inquiry into the objective reasonableness of the defendant's mistaken belief that his or her conduct violated no constitutional right is to be conducted fairly, however, discovery limited to sources of information available to officials in the defendant's position is necessary.

If courts are expected to decide this issue without benefit of discovery, there is a real danger that their decisions, made in an informational vacuum, will deteriorate into an inquiry into the defendant's subjective state of mind, an inquiry expressly forbidden by the Court,[125] or that, lacking a basis for the determination, courts will again collapse what must be a two-step test (when the defendant fails step one) into

120. *Id.* at 3040.
121. *Id.* (emphasis added).
122. *Id.* at 3037.
123. *Harlow*, 457 U.S. at 817.
124. When it comes to subjective intent, "there often is no clear end to the relevant evidence." *Id.*
125. *See Anderson*, 107 S. Ct. at 3040; *Harlow*, 457 U.S. at 817–18.

a one-step inquiry into whether the case law has established the right. This would not afford defendants the full measure of protection intended by the Court.[126]

VI. "IMMUNITY INDEMNITY": A PROPOSAL

Anderson v. Creighton requires the lower courts to achieve two irreconcilable goals: on one hand, defendant officials' summary judgment motions based on

126. A survey of the application of the second, fact-specific prong of the qualified immunity test by the federal courts following *Anderson* reveals continuing difficulties. The Supreme Court's attempt in *Anderson* to resolve problems raised by qualified immunity has been somewhat less than successful.

Some courts still end their analysis of the defense by finding that the right at issue was clearly established at the time of the alleged violation. They do not then consider the second question of whether the defendant could have reasonably, if mistakenly, believed in the constitutionality of his or her actions, even though *Anderson* requires them to do so. *See, e.g.*, Boswell v. Sherburne County, 849 F.2d 1117 (8th Cir. 1988). Having found a pregnant prisoner's right to medical care was clearly established, the court then concluded that "[t]hese facts create a jury question as to whether a reasonable jailer in Lero's position would have known that [her actions] violated Boswell's clearly established right to medical care." *Id.* at 1122. *Anderson*'s second prong treats this as a question of law for the judge, not a jury question. *See also* Brady v. Gebbie, 859 F.2d 1543 (9th Cir. 1988); Stoneking v. Bradford Area School Dist., 856 F.2d 594 (3d Cir. 1988); Conner v. Reingard, 847 F.2d 384 (7th Cir. 1988). In Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1988), the court held that the right at issue was clearly established because a case in that jurisdiction with very similar facts had previously recognized the right on which the plaintiff in this action sued. But the court framed the ensuing inquiry this way: "whether a reasonable law enforcement officer should view the [previous case] as controlling." *Id.* at 1218. This is a variation on the first prong of the *Anderson* test—whether the right was established with sufficient clarity—rather than the second prong inquiry into the reasonableness of the defendant's mistaken belief that his action did not violate the plaintiff's rights.

A more deeply rooted difficulty with the application of the second prong of *Anderson* has involved the proper use of facts in a fact-specific inquiry which is nonetheless to be resolved in most instances without further resort to discovery. *Anderson*, 107 S. Ct. at 3042 n.6. In Brown v. United States, 851 F.2d 615 (3d Cir. 1988), the court quoted at length *Anderson*'s explanation of how clearly established a rule must be to satisfy the first prong. Then the court remanded the *Bivens* action because "the record . . . is presently insufficient for application of the legal standard set forth in *Anderson*. It contains neither an affidavit nor deposition testimony from defendant Granata setting forth his own account of his actions and the information on which he relied in taking them. *See Anderson*, 107 S. Ct. at 3040 (reasonableness of federal official's belief is an objective, fact-specific question)." *Id.* at 619–20. According to *Anderson*, this is a permissible use of discovery: if the plaintiff's version of the facts differs from the defendant's, and the defendant's belief in the constitutionality of his or her conduct is reasonable given the defendant's version of the facts, discovery may be necessary to resolve the issue. *Anderson*, 107 S. Ct. at 3042–43 n.6.

The problem, pointed out in note 113, *supra*, is that deciding on remand whose version to credit sounds very much like trying the case at the summary judgment stage. Terminating litigation by summary judgment, the stage at which qualified immunity is to be resolved, is appropriate only if "there is no genuine issue as to any material fact." FED. R. CIV. P. 56(c), *supra* note 57. This case illustrates the difficulty for courts in applying what the *Brown* court parenthetically acknowledged to be a "fact-specific" inquiry in light of *Anderson*'s insistence on summary judgment as the stage at which qualified immunity must be accepted or rejected. Thus, even though *Anderson* allows the *Brown* remand on this basis, the trial court will find it difficult to follow the appellate court's directions without exceeding the scope of summary judgment.

Noting that *Anderson* emphasized the fact-specific nature of any decision on a qualified immunity defense, the First Circuit Court of Appeals in Unwin v. Campbell, 863 F.2d 124, 128 (1st Cir. 1988), concluded that an interlocutory appeal of a denial of a motion for summary judgment based on qualified immunity *required* consideration of facts gleaned from discovery. Because *Anderson* cautions against delay in ruling on the defense after the summary judgment stage, the judge must examine the facts to be certain there is no genuine issue of material fact. *Id.* at 128.

The dissent argued that the fact-specific inquiry referred to in *Anderson*'s note 6 is not what findings of fact the evidence will support but whether the defendant's conduct was clearly violative of a law. Furthermore, "[i]t would be anomalous to let a defendant force both a district court and an appeals court to pour over a complex record to decide whether the evidence is sufficient to go to a jury, when the practical solution in hard cases is simply to hold the jury trial," *id.* at 140, a course the dissent approved.

qualified immunity must be decided without discovery;[127] on the other hand, the inquiry into the officials' entitlement to qualified immunity on the second prong requires an inquiry into the information the officials possessed when they decided to take the action at issue.[128] An easy but unsatisfactory way to deal with these conflicting demands is to eliminate one of them. The Court could eliminate the second prong altogether, and with it the need for discovery, but the Court obviously considers the "reasonable belief" component important to qualified immunity analysis, having devoted the bulk of the *Anderson* opinion to it. Alternatively, the Court could allow discovery prior to a summary judgment ruling on qualified immunity, but that would mean abandoning its commitment to saving executive officials the time and trouble of submitting to discovery, which the Court emphasized in *Harlow*.[129] Courts cannot be expected to fulfill these two conflicting goals in the disposition of a case, but neither should be forsaken.

The key to a solution is to split the two goals into two separate suits, leaving the question of what information the defendant should have possessed to a second suit for indemnification if the defendant in the first suit loses the constitutional tort action. The first case would be the constitutional tort action. Suppose the defendant official in that action lost on the first, "clearly established" prong of immunity analysis, as was the case in *Anderson*. Relying on *Anderson*, the defendant official would also claim qualified immunity from suit on the basis of the second prong—that even if the right were clearly established, his mistaken belief in the constitutionality of his conduct was objectively reasonable. The court should rule on this question without allowing further discovery of the information the official actually possessed at the time of the alleged violation. The judge in this constitutional tort action should decide this question without reference to what the defendant actually did know, basing the decision instead on what an official in the defendant's position should have known.[130] If the defendant were to lose on this second prong as well and thus be required to stand trial, and were he or she then to lose the case at trial and be found liable for damages, I propose that the official then be allowed to bring a second action, this time as plaintiff, against the agency responsible for the official's ignorance of the constitutional right. That second action would be brought separately from the *Bivens* or section 1983 suit that resulted in the damage award. In that second action, the official and those in the agency responsible for keeping him or her informed about

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Anderson's competing requirements—judicial consideration of specific facts and the need to rule on qualified immunity as early in the proceeding as possible—have created difficulties in cases like *Unwin* and *Brown* that the Supreme Court still needs to address.

127. *Anderson*, 107 S. Ct. at 3042 n.6.

128. *Id.*

129. *Harlow*, 457 U.S. at 817.

130. The official's immunity was defeated under Wood v. Strickland, 420 U.S. 308 (1975) if he or she "knew or reasonably *should have known*" the action violated the plaintiff's constitutional rights. *Id.* at 322 (emphasis added). The same language appears in *Harlow*, 457 U.S. at 818–19: "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official *should know* the law governing his conduct." (emphasis added). The emphasis in my proposed solution to the discovery dilemma on what a defendant official should know, not on what he or she actually did know or would know, is in keeping with the objective standard established in *Harlow*.

constitutional case law would be allowed to discover documents and affidavits to establish whether the official or the employer is responsible for the official's ignorance. The inquiry outlined above[131] into the agent's training and other sources of information available to him or her concerning the status of constitutional law would thus be deferred to this second action. If the official's ignorance is found to be attributable to the department's failure to inform the official, the department would indemnify the official. If, however, the official's ignorance cannot be excused by the department's failure to inform him or her, the official would not be entitled to indemnification.

My proposal would promote three beneficial policy goals. First, it would obviate the need for discovery of the information the defendant possessed prior to a summary judgment ruling, thus freeing the defendant from time-consuming depositions and production of documents. Second, it would allow a court to apply the objective standard and thus set standards for executive officials' conduct concerning citizens' rights based on what officials *should* know, without worrying about whether a defendant's ignorance is the fault of his or her superiors. Thus, this proposal avoids possible injustice to defendants.

Third, the use of a standard based on what defendants should know rather than what they do know avoids potential injustice to plaintiffs as well as defendants. A standard based on what the officials actually do know regarding constitutional rights rather than on what they should know might discourage those in charge of informing officials such as FBI agents of new developments in fourth amendment law, for example. Without an incentive to become informed, agents would find it advantageous to remain ignorant, and thus be unaccountable for constitutional violations that might result from their uninformed conduct. However, held to a higher standard of what they *should* know, defendant officials would find it advantageous to insist that their superiors inform them of developments in constitutional law that are relevant to their official duties. Without the responsibility for indemnifying subordinates, supervisors in charge of training and otherwise informing officials like Anderson of citizens' rights would have no incentive to keep such officials up to date. However, knowing that the department's budget and the supervisors' time dealing with indemnification claims are at risk provides the defendant's supervisors an incentive to improve the quality of communication with agents in the field on constitutional matters. The "immunity indemnification" scheme ought to improve executive officials' awareness of citizens' rights. The result could well be fewer violations of constitutional rights and thus fewer suits with which the courts must deal. At a minimum, plaintiffs' complaints would not be dismissed just because federal or state agencies failed to inform the defendant adequately about the status of actionable constitutional rights.

Because *Bivens* and section 1983 defendants work for the federal government and state governments, respectively, immunity indemnity would have to be made available to officials by the federal government and all fifty states. To my knowledge,

131. *See supra* Part V.

no state or federal statute creates exactly this cause of action, but thirty-two states indemnify state employees for tort damages, generally refusing indemnification for intentional tort judgments.[132] In addition, the Justice Department may indemnify employees for judgments incurred in the scope of their employment and when the Attorney General determines indemnification to be "in the interest of the United States."[133] Indemnity for judgments in section 1983 suits has been applied in cases in a number of states.[134]

Given the prevalence of these statutes, the passage of statutes in jurisdictions that do not as yet provide for section 1983 indemnification and the amendment of existing statutes to provide for immunity indemnification would not be an unreasonable departure for either the federal government or for state governments.

A Colorado district court case, *Sager v. City of Woodland Park*,[135] affords a glimpse into the potential operation of an immunity indemnification scheme. In *Sager*, the defendant City of Woodland Park, sued under 42 U.S.C. § 1983 for the conduct of one of its police officers, brought a third-party action against Colorado Springs for indemnity or contribution, claiming that the third-party defendant's agent, the Colorado Springs Training Academy, was negligent in its training of the Woodland Park police officer.[136] Colorado Springs' motion for summary judgment on this claim was denied.[137] The court found that "as a matter of law, the risks created by the third-party defendant's alleged failure to train properly its officers on shotgun-arrest technique are unreasonable," and that the duty to train officers, including employees of Woodland Park, "foreseeably extends to those wrongfully injured as a proximate result of such improper training."[138]

Sager is not a claim for immunity indemnity. Nor is it a separate suit for indemnity by a defendant who has lost a motion for summary judgment based on qualified immunity and subsequently been found liable for damages. Even so, *Sager* illustrates the scope of a third party's responsibility for proper training of a law enforcement officer of the sort that would provide a basis for indemnification under an "immunity indemnity" statute. As part of his training, the defendant Woodland Park police officer had been shown a film instructing him in the procedure which resulted in the death of the plaintiffs' son. The officer in charge of the training

132. 5 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 29.9 n.20 (2d ed. 1986).

133. 28 C.F.R. § 50.15(c)(1) (1988). The *Anderson* Court noted the existence of this regulation, but characterized it and other indemnification programs as not "sufficiently certain [nor] generally available" to justify the Creightons' claim that indemnification rendered immunity unnecessary. *Anderson*, 107 S. Ct. at 3040 n.3.

134. For decisions applying state indemnification statutes in § 1983 actions, see, e.g., Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974) (applying Massachusetts statute); Gonzalez v. Doe, 476 F.2d 680 (2nd Cir. 1973) (applying Connecticut statute); Cornelius v. La Croix, 631 F. Supp. 610 (E.D. Wis. 1986); Haile v. Village of Sag Harbor, 639 F. Supp. 718 (E.D.N.Y. 1986); Coleman v. Frierson, 618 F. Supp. 1280 (N.D. Ill. 1985); Delahoussaye v. Seale, 605 F. Supp. 1525 (W.D. La. 1985).

135. 543 F. Supp. 282 (D. Colo. 1982).

136. *Id.* at 297.

137. *Id.* at 297–98.

138. *Id.* at 298. Colorado Springs had no immunity from suit under § 1983 as a result of the United States Supreme Court's decision in Owen v. City of Independence, Mo., 445 U.S. 622 (1980). However, because Woodland Park's liability was based on respondeat superior, which the Supreme Court held did not apply to § 1983 suits in Monell v. Department of Social Servs., 436 U.S. 658, 691–95 (1978), the plaintiff's claim against Woodland Park was dismissed. Sager v. City of Woodland Park, 543 F. Supp. 282 (1982).

admitted that the procedure shown in the film was improper, and that those conducting the training had not informed the students that the technique was improper.[139]

Under the proposed immunity indemnity scheme, the deposition of the police academy instructor would be the sort of evidence offered as proof of the government department or agency's fault for not training an official properly. The incorrect information supplied by the training film is analogous to incorrect or outdated information about the application of recent developments in, for example, case law on the fourth amendment. The "immunity indemnity" cause of action would be based on the same concept of duty as the Colorado district court applied in *Sager*.

An objection that might be raised against the legislative creation of a cause of action for indemnification of government officials who have lost their qualified immunity protection and been held personally liable for damages is that such a cause of action is based on respondeat superior. The United States Supreme Court held in *Monell v. Department of Social Services*[140] that respondeat superior does not apply to section 1983 actions. However, the constitutional tort action and the subsequent indemnity proceeding are based on two distinct tort theories. The *Bivens* or section 1983 action alleges unconstitutional conduct against a citizen under color of state or federal law,[141] whereas the indemnity action would allege negligence in not informing the official in the first action of the relevant clearly established law.[142] Officials seeking indemnification would not claim that their department or agency was responsible for their actions on an agency theory, but that they were damaged by the agency's negligent failure to train or provide information required by the nature of the officials' position.

Furthermore, creation by statute of a cause of action for immunity indemnity would not mean that plaintiffs could join the defendant official's department in causes of action under section 1983 or *Bivens*. Only the defendant in a constitutional tort action could bring such a suit, and, in fact, only a subgroup of such defendants would have standing: those who lost their immunity on the second prong of *Anderson*, who then lost at trial, and who must pay a damage award. Even if an official should qualify as a plaintiff in an indemnity action, there would be no assurance that he or she would prevail and be indemnified. Clearly, a cause of action for immunity indemnity would not be equivalent to incorporating respondeat superior into constitutional tort adjudication.

Of the alternative solutions to the discovery dilemma, the legislative creation of a cause of action for immunity indemnity would be the most advantageous for executive officials, for citizen plaintiffs involved in *Bivens* and section 1983 actions,

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139. *Sager*, 543 F. Supp. at 297.

140. 436 U.S. 658, 691–95 (1978). Presumably, respondeat superior does not apply in *Bivens* suits either, because *Bivens* is in most other respects a federal counterpart to § 1983. *See supra* note 4.

141. *See supra* notes 3–4.

142. The court in *Sager* analyzed the cause of action against the third party defendant Colorado Springs in terms of negligence. *Sager*, 543 F. Supp. at 298.

and for courts charged with applying the second prong of executive immunity established in *Anderson v. Creighton*.[143]

VII. Conclusion: A Plea for Legislation

The United States Supreme Court crafted the doctrine of the qualified executive immunity defense to 42 U.S.C. § 1983 and *Bivens* actions in order to protect government officials from insubstantial lawsuits that would distract defendant officials from their duties without remedying constitutional wrongs. As it developed the contours of the doctrine in the 1970s and 1980s, the Court was motivated by concern that qualified executive immunity remain an immunity from suit, necessitating pretrial disposition of the issue, and that defendant officials retain their immunity unless the right on which they were sued was one of which they should reasonably have been aware. The decision in *Anderson v. Creighton* was consistent with these concerns. In *Anderson*, the Court held that even if a court decided that the right sued upon was clearly established by case law, the court still had to deliberate upon whether it was reasonable to expect a person in the defendant's position to have known of the right. However, this expanded inquiry gave rise to two conflicting requirements for the lower courts. The second prong of the test, an inquiry into what the official should have known, must take into account the information the official possessed when he or she decided on the conduct alleged to have violated a clearly established constitutional right. Despite the new requirement that the information the defendant possessed be considered in ruling on the defendant's assertion of qualified immunity, however, the Court continued in *Anderson* to prohibit discovery in most cases prior to a ruling on qualified immunity. Congress and the legislatures of the fifty states should create a cause of action for negligent failure to inform a defendant executive official of the current state of clearly established constitutional law relevant to the official's employment. This would reconcile the Court's requirements concerning discovery and the second prong of the qualified immunity test announced in *Anderson* without working injustice to defendant officials, their government employers, citizens, or the courts.

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143. *See supra* notes 101–26 and accompanying text.